Chapter 10
Law and Governance:
The Genesis of the Commons

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ABSTRACT

The case of Creative Commons (CC) is a good example for describing how a new way to govern Commons has been invented. The Creative Commons (CC) Project was launched with no particular consideration of governance. Its primary aim was simply to share a common resource with common digital management. Several years on, the question of governance, as a logic of collective action, is coming to the fore. Between legicentrism and over-privatization, can both CC governance and governance by CC be seen as an alternative solution for managing future projects on common property in common?

INTRODUCTION

A lot of studies explore the relationship between commons, community and property[1]. Even before the current increase in digital commons Ostrom (1990) drew attention to the importance of governing commons.

Creative Commons is a project that enables the sharing of digital cultural goods through a range of licenses that can be applied to a work, according to the terms desired. It is based on copyright, but with a new rationale of patrimony. That potential for conceptual innovation has led to the success of this "singular legal object"[2], but has, however, also attracted criticism. In essence, this initiative is at the center of new tension between the logics of economics (commercial/non-commercial) and the law (exclusive ownership or shared use). How can we analyze these new institutional formats whose equivalents are seen in other contexts, and which require us to review certain legal concepts?

At this juncture, our focus is on questions of property, common goods, patrimony and governance.

We will firstly explain the difficulty of defining the goods and contracts concerned, then we will turn to *patrimony* with a view to renewing our approach to this notion. In point of fact, considering only the property regime (purely questions of property) means that some analyses have little relevance to the topic in hand. The question of patrimony goes beyond a simple distinction between

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public and private goods, for to administer is first to ensure management, that is, the best management possible in response to specific objectives. In other words, the notions of community and patrimony determine new choices of governance. This chapter looks at these choices.

When the market and the state were considered to have different roles, a balance could be found between individual and general interest. However, since the demarcations between market and state intervention are now becoming less clear, as in cases where the state distorts competition and innovation by strengthening regulation in favor of the market, new types of governance emerge.

PROPERTY RIGHTS AND GOVERNANCE

Goods relevant to CC are immaterial and/or digital goods[3], and may be private or "public." However, this category of "public goods" is difficult to clarify. For economists, a public good is characterized by non-rivalry and non-excludability. Water, for instance, is not a public good since appropriation of this resource may give rise to rivalry. In this, we see the first signs of possible confusion between economic and legal vocabulary: as far as lawyers are concerned, public informational goods are those subsidized by public funding, intended to be accessible to the public, while the law deals with private goods under the concepts of property and private heritage. The question of governance arises when the goods are in a gray area between private property and public service.

Reconsidering Traditional Notions

In the case of copyright, some aspects of ownership have been extended to include intellectual property. Creative Commons and Science Commons have reintroduced the concept of commons. We will now return to these fundamental concepts to give a clearer appreciation of their development.

Property Rights

Ownership was defined in the Civil Code at the beginning of the nineteenth century, on the basis of the Roman law de Justinien (*plena in re potestas*)[4].

Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations (Civil Code Art. 544).

Some characteristics of property such as *exclusivity* are increasingly put into question. From a political standpoint, Angell (2009) stated that property may be considered not as "something owned" but as a government-sanctioned monopoly right which is legally enforced by courts.

However, over the last two centuries, this exclusivity has become limited, particularly where land property and areas covered by the rise in urban planning are concerned. There is now a distortion between fact and law and a growing number consider that a new definition would be desirable. It has been said that this change was the revenge of Greece on Rome, of Philosophy on Law. The Roman concept that justified ownership in relation to its source (family, dowry, inheritance) has been overtaken by a teleological concept that justifies ownership through its aim, its service, and its function. The first draft of the French Constitution in 1946 was thus written: "Ownership cannot be exercised unless it is of social utility."

Some lawyers have attempted to bring together notions of general interest and public domain with a view to changing the current position. The use of a plot of land is forbidden if this is contrary to the designation of the land. Ownership will be removed if the use goes against collective interest.

The term "property" has been used in the field of intellectual property. Property is more than a metaphor: for Elkin-Koren (2006), "It constitutes an effective legal mechanism that allows exclusion." In this legal field, in fact, the changes have been the exact opposite: this right is used increasingly "in the most absolute manner." The CC

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